Key to Briefs

1 - Statement as to Jurisdiction, no. 36
2 - Separate Appendix to Statement as to Jurisdiction Containing Relevant Opinions, Reports and Orders, no. 36
3 - Motion to Advance Case and for Further Relief in Connection therewith, no. 36
4 - Motion to Advance Case, no. 36
5 - Motion for Leave to Join in Jurisdictional Statement filed by Defendant-Appellant, Alleghany Corporation, no. 36
6 - Statement Suggesting Mootness and Motion to Affirm or Dismiss, no. 36
7 - Appellees' Statement in Opposition to Motion to Advance Case, no. 36
8 - Appellees' Reply to Appellant's Brief in Opposition to Appellees' Statement Suggesting Mootness and Motion to Affirm or Dismiss, no. 36
9 - Memorandum of Appellants Joseph S. Gruss, et al., on Behalf of Themselves and Other 6% Preferred Stockholders Similarly Situated, in Opposition to Appellees' Statement Suggesting Mootness
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11 - Brief for Appellant Alleghany Corporation, no. 36
12 - Brief for Appellants Joseph S. Gruss, et al., no. 36
13 - Reply Brief for Appellant Alleghany Corporation, no. 36
14 - Reply Brief (Preferred Stockholders) Appellants Gruss, et al., no. 36
15 - Appendix to Reply Brief for Appellants Joseph S. Gruss, et al., no. 36
16 - Memorandum on Behalf of Appellant Alleghany Corp., Submitted in Opposition to Appellees' Motion to Re-tax Costs, no. 36
17 - Motion to Re-tax Costs, nos. 36 and 82
18 - Brief for Appellant, Adelaide Neuwirth, nos. 36, 82, and 114

19 - Brief for the Interstate Commerce Commission, nos. 36, 82, and 114
20 - Brief for the United States, nos.36,82,114
21 - Brief for the Securities and Exchange Commission, Amicus Curiae, nos. 36,82, 114
22 - Brief for Appellees, nos. 36 and 114
23 - Application for Leave to File Supplemental Brief, and Supplemental Brief,nos.36,114
24 - Statement as to Jurisdiction, no. 82
25 - Statement in Opposition to Appellees' Motion to Dismiss, no. 82
26 - Jurisdictional Statement, no. 114
27 - Petition for Rehearing, nos.36, 82, 114

Appendix A.

December 9, 1955.

SECURITIES & EXCHANGE COMMISSION
Washington 25, D. C.

Gentlemen:

Pursuant to authorization of the Board of Directors of Alleghany Corporation, I file herewith an executed Form N-8A (Notification of Registration), covering the registration of Alleghany Corporation under Section 8(a) of the Investment Company Act of 1940. This registration is made in the light of the recent decision (November 18, 1955) of the United States District Court for the Southern District of New York in an action entitled *Breswick & Company, et ano,* v. *United States of America, the Interstate Commerce Commission, et al.,* File No. 101-114.

This registration is made subject to the following conditions:

1. Alleghany reserves its right to appeal the aforesaid decision in the *Breswick* case to the United States Supreme Court and to contend, among other things, that it is, and at all times since June 5, 1945 has been, subject to regulation under the Interstate Commerce Act and therefore not subject to the Investment Company Act;

2. Alleghany reserves the right to contend that even assuming the aforesaid decision in the *Breswick* case is correct, Alleghany automatically regained its status as a registered company on May 24, 1955 and accordingly this registration is unnecessary.

3. Alleghany reserves the right to contend that the order of this Commission *In the Matter of Alleghany Corporation,* File No. 811-338, promulgated October 4, 1945 exempted Alleghany from the provisions of the

Investment Company Act, until said order was "revoked, suspended or modified after appropriate notice and opportunity for hearing." None of these actions having been taken by this Commission, Alleghany remains exempt from the provisions of the Investment Company Act.

Please advise Edward K. Wheeler, Esquire, 704 Southern Building, Washington 5, D. C., attorney for Alleghany Corporation, if any further clarification or information regarding this filing is desired.

Respectfully submitted,

ALLEGHANY CORPORATION

By s/ DAVID W. WALLACE

DAVID W. WALLACE

Office - Supreme Court, U. S.
FILED
FEB 17 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 36

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

—v.—

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO ADVANCE CASE

HAROLD H. LEVIN
Counsel for Petitioners
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New York 22, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

—v.—

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO ADVANCE CASE

Petitioners, JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co., by their attorney, Harold H. Levin, move this Honorable Court for an order, pursuant to Rule 43(4) of the revised Rules of the Supreme Court of the United States, to advance the argument of the above entitled cause so that it shall be heard with special expedition, and for relief incidental thereto, upon the ground that the petitioners and other

preferred stockholders of Alleghany Corporation similarly situated are suffering, and will continue to suffer, irreparable damage until the issues on this appeal are resolved.

The petitioners, in common with the holders of over 130,000 of approximately 136,000 shares of Series "A" 5½% preferred stock of Alleghany Corporation (hereinafter "old preferred"), prior to June 7, 1955 deposited their shares of such stock with the exchange agent, Marine Midland Trust Co., understanding that upon approval by the Interstate Commerce Commission of an exchange offer—previously approved by the overwhelming majority of all classes of Alleghany stockholders—they would receive in exchange new 6% convertible preferred stock.

The orders of the District Court, appealed from, enjoin and annul the orders of the I. C. C. which continued its jurisdiction over Alleghany and approved said exchange offer, leaving some of the preferred stockholders with nothing but window receipts for their deposited shares and the others with new preferred stock which cannot be sold, traded in or used as collateral and upon which no dividends have been or can be declared pending a decision by this Court.

Effect of injunction on Alleghany's preferred stockholders.

The plight of the preferred stockholders resulting from the issuance of the restraining orders and the temporary and permanent injunctions herein can best be illustrated by what has happened with respect to the stock owned and deposited for exchange by the appellant Gruss & Co.

On June 6, 1955, Gruss & Co. was the owner of 1,100 shares of the old stock, and deposited the same with the

exchange agent. Under the terms of the exchange offer,* upon the approval of the same by the I. C. C., Gruss & Co. was entitled to receive 11,000 shares of the new 6% convertible preferred stock.

The I. C. C. approved the exchange offer by two orders, the last of which is dated June 22, 1955. Subsequently, these appellants received most, but not all, of the new preferred stock to which they were entitled under the plan. The delivery could not be completed due to the issuance by the District Court of an *ex parte* restraining order on June 23, which enjoined further distribution of the new preferred stock after some 900,000 shares had been delivered to stockholders. By virtue of this order the approximately 400,000 undelivered shares were frozen in the hands of the exchange agent.**

The dire effect, on the preferred stockholders, of the restraining order—perpetuated by the injunctions which followed—is described in the affidavit submitted on behalf of these appellants on their motion in the District Court to vacate said order. After pointing to the deposit of their stock and the receipt of part of the new preferred stock in exchange, the appellants stated that, as a result of the restraining order, firms such as Gruss & Co. (1) would not be in a position to deliver securities which they had sold, nor to

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* The purpose of the exchange offer was to eliminate $132.00 in dividend arrears on the old preferred stock, thus to make it possible for the corporation to declare dividends on the common stock for the first time since Allegheny was organized. The vast majority of stockholders voting on the plan favored it, including 97.5% of the common stockholders who voted on the proposal.

** Prior to the issuance of the restraining order, some 100,000 shares of the new stock were sold on a "when issued" basis and some 2,400 shares on The New York Stock Exchange in the regular way.

receive payment therefor; (2) that the firm had sold approximately $250,000 of the new preferred stock, which transaction could not be completed; (3) that commitments had been made in the expectation of receiving said sum; (4) that the firm had purchased stock for customers upon their deposit of the required margin and that the firm was not in a position to fulfill its obligations to its customers, nor to protect itself against loss in the event of a change in the market.

The affidavit, then states:

"13. This Court may take judicial notice of the difficulties, hardships and uncertainties that necessarily flow from the freezing, by the restraining order, of securities having a value in excess of forty million dollars. A stockholder needing cash is not in a position to sell his stock. Brokers are unable to meet their requirements. Those who have sold said new stock will not receive the cash to which they are entitled, as they would except for the issuance of the restraining order herein. Many thousands of shares of the old preferred stock were undoubtedly pledged with banks and brokers, who, at the request of the stockholders, surrendered the old stock in anticipation of the receipt of the new. The restraining order prevents the consummation of these transactions with the result that preferred stockholders in such position will undoubtedly be called upon to post other collateral. Indeed, our firm is in this very position.

"14. Said restraining order does not maintain the status quo, but creates a havoc and uncertainty which defies description. For example, all but 4,000 of the old shares of preferred stock of the Alleghany Corporation have been cancelled and, I am informed, can-

not be reissued under laws of Maryland, the state of incorporation of Alleghany Corporation. The new stock has no market value, since the restraining order has destroyed any proper market. Until the injunction is lifted, no one will be in a position to buy, sell, trade in or hypothecate these securities."

These conditions continue to date since the District Court refused to vacate its restraining order and proceeded to issue a temporary, and then a permanent, injunction.

Dissenting from the majority opinion which granted the temporary injunction, Circuit Judge Hincks commented:

"* * * during the pendency of an injunction the marketability of the new stock which was issued, and consequently its value, will be substantially impaired and its acceptability as collateral will be largely destroyed."

In denying a stay of the temporary injunction District Judge Dimock declared:

"What makes the question perplexing is the plight of the innocent stockholders who have given up their old preferred stock and have got a frozen asset in return."

The appellants and other defendants herein then made a further application for a stay to Mr. Justice Harlan. In his decision Mr. Justice Harlan stated that the

"continuance of the injunction will * * * seriously prejudice Alleghany's preferred stockholders who have surrendered their old preferred stock and are either prevented from receiving the new preferred stock, or to the extent that they have received such stock, are left with a frozen asset; * * *"

He stated further that he was

> "most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders"

pointing out that 900,000 shares of the new preferred stock were distributed but that

> "The temporary injunction bans the issue of additional shares and also forbids further transfer of those 900,000 shares by Alleghany or its agents. Thus these shares are not readily marketable or acceptable as collateral, and the holders of some 40,000 shares of the old stock are not able to receive from Alleghany the 400,000 shares of new stock to which they are entitled under the exchange offer. The value of the old preferred stock on May 1, even before the exchange was approved by the I. C. C., was in the neighborhood of $40,000,000, which is many times that of the plaintiffs' shares, presently valued at about $7,000."

In granting a partial stay, Mr. Justice Harlan said:

> "But for the fact that staying the injunction to the full extent that it affects the preferred stock issue might largely render moot the appeal from that part of the injunction, I would be disposed to grant that relief. * * * Under the circumstances, I think the fair thing to do is to stay the injunction insofar as it relates to the 900,000 shares of the new preferred stock which already have been issued, and let the injunction stand as regards the 400,000 unissued shares."

Despite such stay, which was continued in the final order, the holders of the 900,000 shares receive no dividends and the shares are still not cleared for trading by either The

New York Stock Exchange or The National Association of Security Dealers. Thus, for all practical purposes the $40,000,000 of securities involved, which are held by the general public, continue to be, pending a decision of this Court, non-negotiable, non-pledgable and, of course, they yield no income.

Delay in the hearing and determination of this appeal will further aggravate the damage which the long continued suspension of their property rights inflicts on these preferred shareholders. We ask the aid of this Court in securing a speedy final disposition of this protracted litigation so that the preferred stockholders may be relieved of the continuing harm so often referred to in the earlier opinions herein.

Pressing issues of public interest.

In order not to delay this appeal, these appellants are not filing a separate jurisdictional statement. It may not be remiss, therefore, if we here point out that, apart from the plight of the preferred stockholders, there are additional reasons for expediting this appeal. There are substantial issues of importance to the public which need early resolution.

As a result of the decision below, doubt has arisen respecting the area of jurisdiction of the I. C. C. and the propriety of long established Commission procedures.

This case presents the question whether, when the I. C. C. issues a status order, thereby assuming jurisdiction over a corporation, its jurisdiction continues pursuant to the terms of such order and Section 15(2) of the Interstate Commerce Act until further order of the Commission or action by a court terminating the status order.

It is important for this Court to determine whether the public has a right to rely upon the regulatory orders of

administrative agencies such as the I. C. C., while such status or jurisdictional orders remain unrevoked by the agency or the courts. By virtue of the decision below it now seems that acts done pursuant to an I. C. C. order may be directed to be undone, possibly years afterwards, not because the authorizing order itself is improper, but because, contrary to the Commission's view, its order asserting jurisdiction had ceased to be effective when the authorizing order was issued.

As a corollary to the last, is the question whether a minority stockholder has the right to obtain a court review of orders which establish status for the purpose of regulatory jurisdiction. In this connection, it should be noted that while the appellee common stockholders have been granted the right of review on the theory that they might be adversely affected by the exchange offer, actually the avowed basis for enjoining its consummation was that Allegheny, despite its control of New York Central, did not have the status of a carrier and therefore was subject to the supervision of the S. E. C. rather than the I. C. C.

There is presented the question whether, assuming there was justification for annulment of the order making Allegheny subject to the supervision of the I. C. C., the District Court, sitting as a court of equity in this case, should have weighed the equities before nullifying the exchange offer. Should not the District Court have balanced the certain, immediate and irreparable damage which enjoining the exchange offer would cause the preferred stockholders against the slight and, at best, conjectural harm which the appellees asserted would come to them by virtue of having their interests protected by the I. C. C. rather than by the S. E. C.? It may be worth noting in this connection that Congress, in exempting from S. E. C. jurisdiction carriers subject to

regulation by the I. C. C., demonstrated a greater confidence in the I. C. C. than that shown by the Court below.

Finally, it should be determined whether, if the District Court correctly held that certain procedural requirements had been omitted by the I. C. C., this case should not have been referred back to that agency to cure the defects, thereby avoiding the great damage to innocent third parties hereinabove described.

For the foregoing reasons, it is earnestly requested that the Court expedite this appeal by entering an order to advance this case on its calendar.

Dated, February 8, 1956.

Respectfully submitted,

HAROLD H. LEVIN
Counsel for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

ADELAIDE NEUWIRTH, et al.,

Appellant,

v.

BRESWICK & CO., et al.,

Appellees,

M O T I O N

ALEXANDER KAHAN
60 BROAD STREET
NEW YORK 4, N. Y.

Office - Supreme Court, U.S.
FILED
MAR 1956
HAROLD B. WILLEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

NO. 36

ADELAIDE NEUWIRTH,

Appellant,

-v.-

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON MEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO JOIN IN JURISDICTIONAL STATEMENT FILED BY DEFENDANT-APPELLANT, ALLEGHANY CORPORATION

Petitioner, ADELAIDE NEUWIRTH moves this honorable Court for an order pursuant to the Revised Rules of this Court, to permit her to join in the jurisdictional statement of defendant-appellant, Alleghany Corporation, filed in Alleghany Corporation vs. Breswick & Co., et al., (Docket No. 692) on February 15, 1956.

On February 3, 1956, petitioner, a common stockholder of Alleghany Corporation, duly served and filed a Notice of Appeal from a final judgment and injunction dated December 23, 1955 which annulled and voided certain orders of the Interstate Commerce Commission and enjoined Alleghany Corporation and its agents from completing the issuance of new six percent (6%) convertible preferred stock in exchange for its old preferred stock. One of the

orders annulled had approved this exchange offer.

The Alleghany Corporation has filed a jurisdictional statement together with an appendix which contains copies of all opinions and orders material to petitioners appeal. The questions presented on the Alleghany Corporation's appeal from the judgment and injunction above mentioned are to an extent similar to those presented in petitioner's Notice of Appeal.

In order to avoid redundancy and to expedite the hearing and determination of both appeals, it is respectfully requested that the petitioner herein be permitted to joinin Alleghany's jurisdictional statement, to which she subscribes, and that petitioner be not required to file a separate jurisdictional statement.

It would seem that this application is consistent with the intendment of Rule 15, subd. 3 of this Court, which states:

> "Where several cases are appealed from the same court that involve identical or closely related questions, it shall suffice to file a single jurisdictional statement covering all the cases."

The relief prayed for in this motion should be granted to avoid redundancy and for the benefit of all parties concerned.

Dated: February 29, 1956

Respectfully submitted,

ALEXANDER KAHAN
Counsel for Petitioner
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TO:

Honorable William V. Connell,
Clerk of the United States District Court
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Edward M. Garlock, Esq.
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New York 17, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BREWICK & CO., RANDOLPH PHILLIPS and MYRON MEISROSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,	:
Plaintiffs,	:
-against-	:Civil Action File No.
UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WIRTHER and ALVIN J. DELAIRE, a copartnership, doing business as Gruss & Co., SAMUEL A. SHUFRO, SALVYN SHUFRO, individually and on behalf of his firm, Shufro, Rose & Co., and in behalf of all holders of the 6% Convertible Preferred Stock of Alleghany Corporation similarly situated, BAKER, WEEKS & CO., OSCAR GRUSS & SON, IRVING NEUMAN as trustee under a deed of trust dated November 6, 1943, HOWARD CORNISH, and ADELAIDE NEUWIRTH on behalf of herself and all other common stockholders similarly situated,	:101-114
Defendants.	:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. NOTICE IS HEREBY GIVEN that ADELAIDE NEUWIRTH on behalf of herself and all other common stockholders similarly situated, an intervening defendant above named, hereby appeals to the Supreme Court of the United States from each and every part of the final judgment and injunction entered in this action on December 23, 1955, which enjoined Alleghany Corporation, its transfer agents, officers, directors, servants and employees, from taking any steps in connection with or in furtherance of issuance of 6% convertible preferred stock in exchange for 5-1/2% preferred stock, or for any other purpose, or the transfer thereof.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101(b).

II. The Clerk is not requested to prepare any transcript of the record in this cause other than that already requested by the defendant Allegheny Corporation.

III. The following questions are presented by this appeal:

1. Whether, assuming plaintiffs' right to challenge the orders of the I.C.C., the District Court erred in enjoining said preferred stock orders, thus causing irreparable damage to Allegheny's innocent preferred and common stockholders.

2. Whether the District Court committed an abuse of discretion in granting a preliminary injunction and a permanent injunction restraining the completion of Allegheny's offer to exchange new preferred stock for its old preferred stock.

Dated: February 2, 1956

ALEXANDER KAHAN & ARTHUR W. LICHTENSTEIN, Esqs.

By Alexander Kahan

Attorneys for intervening Defendant
Adelaide Neuwirth, etc.,
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TO:

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For the Southern District of New York,
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Attorney-General of the United States of America,
Attention of James M. Durkin, Esq.
Attorney for defendant, United States of America,
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Office - Supreme Court, U. S.
FILED
MAR 16 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 36

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT SUGGESTING MOOTNESS and MOTION TO AFFIRM OR DISMISS

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RANDOLPH PHILLIPS,
Appellee, Pro se,
53 East 74th Street,
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QUESTIONS PRESENTED BY THE APPEAL 1

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STATEMENT SUGGESTING MOOTNESS 7

(A) Alleghany's voluntary registration with the S.E.C. under the Investment Company Act of 1940, three weeks after issuance of the final opinion of the District Court setting aside the jurisdiction and orders of the I.C.C., has mooted all questions relating thereto 7

1. Alleghany's registration with the S.E.C. and its simultaneous repudiation of I.C.C. jurisdiction is "unconditional" 8

2. Section 8(f) of the Investment Company Act prevents defeat of the jurisdiction of the S.E.C. by this action to which it is not a party 9

3. Alleghany's "unconditional" submission to the S.E.C.'s exclusive jurisdiction renders moot any appeal based on the I.C.C. orders 10

4. In view of the provisions of Section 3 of the Investment Company Act, Alleghany's registration with the S.E.C. thereunder constitutes a waiver and abandonment of its position before the I.C.C. on which the latter's assumed jurisdiction was predicated, an admission that the I.C.C.'s orders are invalid, and an acquiescence in the judgment of the District Court 11

5. Alleghany's new and "unconditional" registration on December 9, 1955, without fur-

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ther order by the S.E.C. since 1945, moots its defense that the S.E.C.'s 1945 order "in effect determined that it would not assert regulatory authority over Alleghany until its further order". (Statement as to Jurisdiction, p. 21.) 12

(B) Three weeks after filing in this Court its Statement as to Jurisdiction, Alleghany voluntarily filed with the S.E.C. an application for approval of its recapitalization plan under the Investment Company Act of 1940. It thereby has mooted its contention that the I.C.C. and not the S.E.C. had jurisdiction over the Plan 13

ALLEGHANY'S JURISDICTIONAL STATEMENT OMITS CRUCIAL FACTS 15

ARGUMENT 18

Assuming that 11 of appellant's 12 questions are not mooted as suggested by the foregoing statement, these and the single remaining question were correctly decided 18

1. The District Court correctly held that after Alleghany divested itself of control of all carriers it became a non-registered investment company, subject to the jurisdiction of the S.E.C. under the Investment Company Act, and that it could not lawfully continue to act for the next 14 months under the jurisdiction of the I.C.C. and avoid S.E.C. regulation by virtue of the 1945 order authorizing the control that had been divested 18

2. The District Court correctly held that Alleghany, if it in fact acquired control of the New York Central system of 73 carriers, was required to make an application to the I.C.C. for approval of that acquisition,

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pursuant to the express requirements of Section 5(2) of the Interstate Commerce Act 20

3. Appellant misreads this Court's decision in *U. S.* v. *Marshall Transport Co.*, 322 U. S. 31 21

4. The District Court correctly held that the I.C.C. erred in finding that Alleghany controlled Central without approving that control and without making the requisite finding that such control was "consistent with the public interest" as required by Section 5(2)(b) 22

5. The District Court correctly held that the I.C.C.'s finding that Alleghany controlled Central was not supported by substantial evidence 22

6. The District Court correctly found that plaintiffs-appellees had standing to review the I.C.C. orders 22

7. The sole remaining question not mooted by Alleghany's registration with and application to the S.E.C. was correctly decided by the District Court 22

(A) The District Court's order has had the practical result of freezing the preferred stock in the hands of the original stockholders. As a direct result of Alleghany's representations to Mr. Justice Harlan that it was not subject to S.E.C. regulation as an investment company, the stay granted by Mr. Justice Harlan admittedly proved to be "a futile act" 25

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(B) The District Court properly frustrated consummation of a plan under which common stock conversion rights currently worth roundly 49 million dollars in the market at the time of the I.C.C. order, were to be given to holders of the Old Preferred stock having a maximum legal claim of only 32 million dollars 27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 692

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT SUGGESTING MOOTNESS and MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16 of the Revised Rules of this Court and the practice of this Court with respect to suggestions of mootness, Breswick & Co., Myron Neisloss and Randolph Phillips, appellees, move that the judgment of the District Court be affirmed or dismissed.

Questions Presented by the Appeal

1. Is Alleghany prosecuting this appeal in good faith in view of its joinder in the preferred stockholders' appli-

cation before the S.E.C., which admittedly "proceeds on the assumption of affirmance" by this Court?

2. Are not all of appellant's 12 questions* rendered moot by reason of its repudiation of I.C.C. jurisdiction and its registration with the S.E.C. after the decision of the District Court?

3. Has not appellant mooted all of its questions relating to the preferred stock plan, or admitted the correctness of the judgment below with respect to these questions, by reason of its application to the S.E.C. for approval of the plan nine days after it had served its Statement as to Jurisdiction herein claiming that the I.C.C. had exclusive jurisdiction over the plan?

4. May an investment company, after it has divested itself of control of all carriers, properly continue to act under the jurisdiction of the Interstate Commerce Commission for fourteen months after such divestment and thereby escape regulation by the S.E.C. under the Investment Company Act until the I.C.C. finds that the investment company, subsequent to such divestment, has acquired control of a new system of carriers, and, by virtue of that new control, gain retroactive exemption from the Investment Company Act?

5. When Section 5(2) of the Interstate Commerce Act requires that a non-carrier seeking control of two or more carriers must apply to the I.C.C. for approval of such acquisition, may a non-carrier which refuses to file such an application for control of a railroad system of 73 affiliated carriers, avoid subjecting the lawfulness of such acquisition to I.C.C. scrutiny and obtain I.C.C. jurisdiction over itself as a non-carrier simply by joining itself as a party to an application to approve an intra-corporate

* Except appellant's No. 4, restated herein as appellees' No. 8.

merger or lease between two subsidiary companies of the parent?

6. Where two individuals in control of an investment company purchase in association with two other individuals for their personal account 1,000,000 shares of stock of a carrier while limiting the investment company's purchase to 11,400 shares of the carrier's stock, can the I.C.C. properly find that the investment company and not the individuals had acquired control of the carrier? After a proxy contest for the control of the carrier had been concluded with the election of the four individuals and their eleven nominees, could the I.C.C. properly find (on these facts, and upon a claim of subsequent purchase by the investment company of 600,000 shares of the carrier, and over the objection of minority stockholders, and without a requested hearing, evidentiary or otherwise) that the investment company and not the four individuals had acquired control of the carrier and that no application for acquisition of such control was required to be made to the I.C.C., and that this non-approved control was sufficient to give the I.C.C. jurisdiction over the investment company so as to permit it to avoid regulation by the S.E.C. under the Investment Company Act?

7. Where a non-carrier allegedly subject to I.C.C. jurisdiction obtains without a requested hearing, evidentiary or otherwise, the approval by the I.C.C. of a recapitalization plan, under which new preferred stock with conversion rights currently valued in the market at $49,000,000 are to be given in exchange for old preferred stock with a maximum legal claim of $32,000,000 (20% of which was owned by the company's Chairman and President), do lawfully intervening common stockholders of the non-carrier who were denied any hearing by the I.C.C. have standing to review in a statutory court the I.C.C. orders granting such approval?

8. Where a non-registered investment company disrupts the *status quo* while a motion for a preliminary injunction is *sub judice* and proceeds to issue securities in violation of the Investment Company Act pursuant to void orders of the I.C.C. authorizing such issuance, was it proper for the District Court to enjoin their distribution and to take all steps necessary to preserve the *status quo*, thereby preventing the unauthorized securities from passing into the hands of innocent persons?

Statement of Prior Proceedings

This is a direct appeal from a final judgment, entered on December 23, 1955, by a three-judge District Court pursuant to 28 U.S.C. 1336, 1398, 2284 and 2321 through 2325, inclusive, on a complaint to enjoin, set aside, annul or suspend four orders of the Interstate Commerce Commission dated March 2, 1955, May 24, 1955, May 26, 1955 and June 22, 1955, the first two in Finance Docket No. 18656, and the last two in Finance Docket No. 18866.

On September 17, 1954, Alleghany, The New York Central Railroad Company and two subsidiaries of the New York Central (The Louisville & Jeffersonville Bridge & Railroad Co. and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as "the Big Four") filed with the I.C.C. an application allegedly pursuant to section 5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2). Upon its face the principal object of the application was to obtain approval for a merger of the Bridge Company into the Big Four.

The substantial effect of the granting of the application, however, would have been, as claimed by Alleghany, to constitute Alleghany, pursuant to the provisions of section 5(3) of the Act, a non-carrier "considered as a carrier" subject to the Interstate Commerce Act for the purpose of the issuance of securities, etc. It was conceded in

the Court below that, except for the effect of such an order that Alleghany should be "considered as a carrier", it would be an investment company subject to regulation by the S.E.C. under the provisions of the Investment Company Act (15 U.S.C. §80a-1 *et seq.*).

Thus, on Alleghany's theory, the granting of the application constituted a determination that in issuing securities and other activities Alleghany was subject to regulation by the I.C.C. rather than by the Securities and Exchange Commission. The immediate importance of this question was in connection with the attempted issuance of a new class of 6% convertible preferred stock pursuant to an exchange offer authorized by the Alleghany directors, made public on January 14, 1955, approved by the Alleghany stockholders with holders of 30% of its common stock not voting, and thereafter approved by the orders of the I.C.C. which were subsequently annulled by the District Court. The Exchange Offer was never submitted to or approved by the S.E.C.

On February 18, 1955, Alleghany filed with the I.C.C. its application for leave to issue the new class of preferred stock.

The I.C.C. refused to hold any evidentiary hearings or to grant argument orally or by brief on either application, despite appellees' denial in applications to intervene, of the facts and the legal conclusions alleged by Alleghany.

By order dated March 2, 1955, the I.C.C., through its Division 4, approved the merger application and declared Alleghany to be "considered as a carrier" and, on May 24, 1955, the full Commission affirmed this order.

On May 26, 1955, two days after the order of the full Commission approving the merger, Division 4 of the I.C.C. approved the issuance of the preferred stock.

On June 6, 1955, the complaint in this action was filed and, on June 15, 1955, plaintiffs moved for a preliminary

injunction against enforcement of the jurisdiction-assuming orders of March 2, 1955 and May 24, 1955. Attack on the preferred stock order of May 26, 1955 was postponed prior to final action of the full Commission on the theory that court review prior to such action would be premature.

On June 22, 1955, the entire Commission affirmed the preferred stock order of Division 4. These two preferred stock orders were also reviewed by the District Court after they were introduced into the case by supplemental complaint upon consent of the appellant given in open court.

On June 23, 1955, Alleghany, immediately upon learning of the full Commission's order finally approving the issuance of the preferred stock and after appellee's motion for a preliminary injunction had been noticed for hearing but before the District Court had an opportunity to decide the motion, began distribution of the new stock pursuant to the Exchange Offer. Distribution was halted by a temporary restraining order issued by the District Court a few hours after distribution was commenced but not before more than half of the proposed issue had been exchanged. The effect of the temporary restraining order has been to prevent the transfer of the shares of new preferred stock and consequently to halt trading therein on the New York Stock Exchange. Subsequent motions to vacate the restraining order were denied.

On July 21, 1955 the District Court granted a preliminary injunction* and on November 18, 1955 a final judgment** in favor of the plaintiffs-appellees, which set aside, voided and annulled all of the above-mentioned

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* *Brestwick & Co.* v. *U. S.*, 134 F. Supp. 132; Alleghany's Separate Appendix, p. 1.

** The *per curiam* opinion is printed at p. 33, Alleghany Statement as to Jurisdiction, and the final judgment at p. 66.

I.C.C. orders, and enjoined consummation of the preferred stock plan and all trading and transfer of the new securities.* Since the occurrence of these events, Alleghany voluntarily filed on December 9, 1955, its registration with S.E.C. under Section 8 of the Investment Company Act of 1940, and on February 24, 1956 applied to the S.E.C. for retroactive approval of the preferred stock plan.

These acts of Alleghany in so filing are the basis of appellees' contention that all questions presented by the appeal which reversed the said orders of the I.C.C. have been mooted.

Statement Suggesting Mootness

(A) Alleghany's voluntary registration with the S.E.C. under the Investment Company Act of 1940, three weeks after issuance of the final opinion of the District Court setting aside the jurisdiction and orders of the I.C.C., has mooted all questions relating thereto.

The main *per curiam* opinion of the District Court (Alleghany Statement as to Jurisdiction, Appendix A, p. 33) was filed on November 18, 1955. It held that from January 19, 1954** to that date (or, assuming *arguendo* the validity of certain arguments of Alleghany, at least from May 24, 1955 to November 18, 1955) the Interstate Commerce Commission did not have jurisdiction

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* By a second *per curiam* opinion (Alleghany Statement as to Jurisdiction, p. 57) the District Court made the preliminary injunction permanent.

** Footnote 7a to the District Court's *per curiam* final opinion of November 18, 1955, suggesting that Alleghany's liability under the Investment Company Act began on May 21, 1954 instead of January 19, 1954, was held not to constitute a finding of fact or a conclusion of law by the Court's Second Supplemental Opinion (Alleghany Statement as to Jurisdiction, Appendix C, p. 59). See footnote at p. 15, this Motion, for the actual findings of both the I.C.C. and the District Court.

of Alleghany; that Alleghany was a non-registered investment company within the meaning and prohibitions of the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, and "could not thereafter (*i.e.*, after May 24, 1955), lawfully issue any new securities because of Section 7 of that Act, 15 U.S.C. Section 80a-7".*

On December 9, 1955, three weeks after the final decision of the District Court, Alleghany voluntarily registered with the S.E.C. under Section 8 of the Investment Company Act of 1940. See Alleghany's admission to that effect, Jurisdictional Statement, pp. 16-17.

1. Alleghany's registration with the S.E.C. and its simultaneous repudiation of I.C.C. jurisdiction is "unconditional."

Despite Alleghany's suggestion in its Motion to Advance Case (p. 7) that it registered with S.E.C. only "on the terms and conditions set forth in the attached letter (marked Appendix A) filed with its notification of registration", that registration was in fact "unconditional". The following testimony (unprinted record, pp. 913-915) of David W. Wallace, house counsel and secretary of Alleghany, given on December 14, 1955 in certain proceedings in the New York Supreme Court, establishes the unconditional nature of the registration:**

"Q. On the basis of your experience with the Securities and Exchange Commission regulations as

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* Alleghany Statement as to Jurisdiction, Appendix A, p. 39. In the second paragraph therein, sixth line, the words "Interstate Commerce Act" are a misprint for "Investment Company Act." Also see pp. 39-40 reading: "When, however, at the latest on May 24, 1955, the June 5, 1945 I.C.C. order lost its efficacy, thereupon the S.E.C. order of October 25, 1945 became automatically inefficacious, with the result that Alleghany immediately became again subject to the Investment Company Act. (Footnote omitted)."

** This testimony appears in the record in this case in the affidavit of Randolph Phillips affirmed Dec. 21, 1955, submitted on settlement of the final judgment herein.

a lawyer, Mr. Wallace, can you tell me whether that means that Alleghany Corporation is now registered as an investment company with the Securities and Exchange Commission? A. Yes, that means that Alleghany Corporation is registered as an investment company under the Investment Company Act of 1940, as of December 9, 1955, when we filed our notification of registration.

Q. Subject to the conditions in the letter of December 9, 1955? A. No; it is not subject to those conditions in the sense that the registration was final regardless of conditions.

The conditions were merely our way of telling the the S.E.C. that we were not in any way reversing our field or our stand regarding these other items.

But the notification—and I made this clear in conversations with the S.E.C. on Friday—the notification of registration is filed unconditionally, and Alleghany has registered itself under the Investment Company Act of 1940."

2. Section 8(f) of the Investment Company Act prevents defeat of the jurisdiction of the S.E.C. by this action to which it is not a party.

There is only one kind of registration under the Investment Company Act, namely an "unconditional" registration under Section 8 thereof. Congress has provided no other.

Alleghany seeks in effect to terminate that registration and its submission to S.E.C. jurisdiction by its appeal herein. This it may not do, since Congress has provided that registration under the Investment Company Act may be terminated only by an order of the S.E.C. under Section 8(f) of that Act which reads:

"Whenever the Commission, on its own motion or upon application, finds that a registered investment company has ceased to be an investment com-

> pany, it shall so declare by order and upon the taking effect of such order the registration of such company shall cease to be in effect. If necessary for the protection of investors, an order under this subsection may be made upon appropriate conditions. The Commission's denial of any application under this subsection shall be by order."

The S.E.C. is not a party to this action, nor have any proceedings before it been instituted under Section 8(f). In view of Alleghany's admission that it is an investment company, it is not in a position to apply for a finding that it has "ceased to be an investment company" unless the company has changed its character since registration on December 9, 1955. There is no evidence in the record of such a change.

3. Alleghany's "unconditional" submission to the S.E.C.'s exclusive jurisdiction renders moot any appeal based on the I.C.C. orders.

As stated in Robertson & Kirkham, *Jurisdiction of the Supreme Court* (Wolfson & Kurland, ed. 1951), p. 514:

> "A suit by one administrative agency to prevent a corporation from carrying out a plan of recapitalization allowed by another becomes moot when the corporation voluntarily submits to the exclusive jurisdiction of the former. (Citing *S.E.C.* v. *Long Island Lighting Co.*, 325 U. S. 833, 65 S. Ct. 1085, 89 L. Ed. 1961.)"

The present case is almost exactly parallel to *Long Island Lighting,* with one crucial exception. In that case the facts of which appear in detail in Circuit Judge Clark's dissent in 148 F. 2d 252, there was no attempt by *Long Island* as was here attempted by Alleghany, to present the courts with a *fait accompli* in the face of a pending motion for a preliminary injunction. In the present case

that attempt disrupted the *status quo* and presented the only remaining question not mooted by Alleghany's registration with the S.E.C. [See Argument, *infra*, p. 22 *et seq.*]

4. In view of the provisions of Section 3 of the Investment Company Act, Alleghany's registration with the S.E.C. thereunder constitutes a waiver and abandonment of its position before the I.C.C. on which the latter's assumed jurisdiction was predicated, an admission that the I.C.C.'s orders are invalid, and an acquiescence in the judgment of the District Court.

In an attempt to overcome the legal effect of its concededly "unconditional" registration with the S.E.C., Alleghany states that it has reserved "its rights to terminate such registration when this Court should determine that I.C.C. correctly asserted jurisdiction to continue to regulate Alleghany as it has since 1945". (Statement as to Jurisdiction, p. 17.)

But no action of this Court can overcome Alleghany's admission when it registered with the S.E.C. on December 9, 1955, that it was an investment company within the meaning of Section 3(a) [the definition section] of the Investment Company Act. Since the record herein does not disclose any change in Alleghany's corporate status or powers as defined by Section 3(a), between March 2, 1955 (when the first order of Division 4 issued) and December 9, 1955 (when Alleghany registered with the S.E.C.), the admission necessarily extends to the period when Alleghany sought to issue the new Preferred Stock based upon the I.C.C.'s final order of May 24, 1955 in Finance Docket No. 18656 (the so-called "status" or jurisdictional proceeding) and its final order of June 22, 1955 in Finance Docket No. 18866 approving the issuance of the preferred stock.

Section 3(c) of the Act declares that "none of the following persons is an investment company within the meaning of this title" and subsection (9) thereof includes "any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company". Thus when Alleghany registered under the Investment Company Act it necessarily admitted that it was not "subject to regulation under the Interstate Commerce Act, etc." and, *ipso facto* lost the benefit of the alleged statutory exemption granted by Section 3(c)(9). If Alleghany were not subject to the Interstate Commerce Act on December 9, 1955, it was not subject to it prior to that date and from at least May 24, 1955, since the record herein does not disclose any change within the meaning of Section 3 in its corporate status or powers during that period. Such an admission completely negates its pleadings before the I.C.C. and its contentions to the contrary now urged in this Court.

5. Alleghany's new and "unconditional" registration on December 9, 1955, without further order by the S.E.C. since 1945, moots its defense that the S.E.C.'s 1945 order "in effect determined that it would not assert regulatory authority over Alleghany until its further order". (Statement as to Jurisdiction, p. 21.)

By its registration Alleghany has submitted to the regulatory authority of the S.E.C. without that very "further order" which it has hitherto claimed was a necessary pre-condition to effective regulation under the Investment Company Act, and has thus waived and abandoned this contention.* Finally the S.E.C. is now

* Prior to this waiver, the District Court found this contention to be without substance. See pp. 39-40, Alleghany Statement as to Jurisdiction. In a collateral case the District Court found that this defense was not made in good faith. *Brewick* v. *Briggs*, 135 F. Supp. 397, at pp. 400, 401.

actually exercising that regulatory authority. See its notice and order for hearing on the now pending applications by Alleghany and the holders of some 18% of Alleghany's old Preferred Stock. These latter include certain of the appellants herein in undocketed appeals from the same judgment Alleghany is appealing from* and who are asking the S.E.C. to exempt from or approve the pending recapitalization plan under the Investment Company Act, pursuant to Section 6(c) thereof. *In the Matter of Alleghany Corporation*, Investment Co. Act Release No. 2313, February 13, 1956.

(B) Three weeks after filing in this Court its Statement as to Jurisdiction, Alleghany voluntarily filed with the S.E.C. an application for approval of its recapitalization plan under the Investment Company Act of 1940. It thereby has mooted its contention that the I.C.C. and not the S.E.C. had jurisdiction over the Plan.

According to the S.E.C.'s recitals in its Notice of this Filing dated March 2, 1956 (Investment Co. Act release No. 2323), Alleghany "states that the filing of its application herein is not a waiver of any of the conditions set forth in a letter of Alleghany dated December 9, 1955 accompanying its Notification of Registration as an investment company." This letter is the same one referred to above (pp. 8, 9). The "conditions" were specifically waived, and the registration was in fact "unconditional" as is shown by the testimony of Alleghany's house counsel set forth above at pages 8 and 9.

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*Appeals have been taken by defendants Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership doing business as Gruss & Co.; Adelaide Neuwirth; Samuel A. Mehlman; Baker Weeks & Co.; Oscar Gruss & Son; Irving Neuman as Trustee, etc.; and Edward Gornish. None of these appellants have filed a statement as to jurisdiction, and all apparently are adopting or seeking to adopt Alleghany's statement.

By this "unconditional" registration and now by Alleghany's application to the S.E.C. for approval of the plan three weeks after filing its jurisdictional statement herein, Alleghany must be deemed to have conceded that the I.C.C. did not, as the District Court found, have jurisdiction over the plan. (See *Robertson & Kirkham, op. cit., supra,* p. 10).

The Current S.E.C. Hearing is Proceeding "on the Assumption of Affirmance" by this Court.

Alleghany states at page 6 of its application dated February 23, 1956 to the S.E.C. for approval of the preferred stock plan:

> "The purpose of Alleghany in making this application is to afford the speediest possible relief to its security holders."

In a memorandum filed with the S.E.C. under date of March 9, 1956, counsel to the preferred stockholder applicants (Cleary, Gottlieb, Friendly & Hamilton, Esqs.) state:

> "The possibility of affirmance by the Supreme Court does not provide any reason for Commission refusal to consider the Preferred Stock Application. To the contrary, the Application proceeds on the assumption of such affirmance * * *" (p. 7).*

Alleghany's subsequent application to the S.E.C. adopts the position and recitals of the preferred stockholders'

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* The memorandum continues that "in such event, further proceedings for an exemption under Section 6(c) before the Commission would doubtless be required." Further proceedings would also be required, counsel argued, even in the event of the non-assumed reversal. After receiving this memorandum the S.E.C. denied appellees' motion for a stay of its proceedings pending the final order of this court on the appeal, and hearings were begun on March 12, 1956.

application. In view of this joinder by Alleghany and the admissions implicit in its act of registration, it would seem that this appeal is not being prosecuted by Alleghany in good faith.*

Alleghany's Jurisdictional Statement Omits Crucial Facts

The context in which the present controversy arose can be made clear only by a consideration of the following facts:

1. On January 19, 1954, Alleghany divested itself of control of the Chesapeake & Ohio Railway Company "and no longer controlled or had the power to control any carrier subject to the (Interstate Commerce) act." (I.C.C. Report, Alleghany Appendix, p. 99).**

2. "In view of the above stated divestiture by Alleghany of the stocks of carriers subject to the act, we conclude that at the time of its acquisition of control of the Central on May 26, 1954, it was in fact a 'person not a carrier' as that phrase is used in Section 5(2) of the Act." (Id., p. 100).

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* In fact, Alleghany's directors have already offered to settle their liabilities for violation of the Investment Company Act by paying $700,000 and other considerations to Alleghany. *Breswick* v. *Briggs*, 135 F. Supp. 397.

** The District Court concurred in this I.C.C. finding but also found:

> "On January 19, 1954, Alleghany divested itself of the C & O stock that it had theretofore held. The Nickel Plate stock had been earlier sold * * *. From the instant of Alleghany's relinquishment of control of the C & O and the Nickel Plate, plaintiffs here were entitled to the special protection which Congress has provided for stockholders in investment companies which do not control railroads." (Alleghany's Separate Appendix, pp. 15-16).

The Court should note that footnote 7a to the *per curiam* opinion, relating to the date when Alleghany ceased to be a carrier was specifically eliminated as a finding of fact or a conclusion of law in the District Court's Second Supplemental Opinion (Alleghany's Statement as to Jurisdiction, p. 59), thus leaving the above finding in its prior Opinion unchanged.

3. Young, Kirby, Murchison, and Richardson personally owned 1,000,000 shares of New York Central's capital stock, compared with Alleghany Corporation's ownership of only 11,400 shares, at the time the Corporation is alleged to have acquired control of Central as a result of the 1954 proxy contest.

For a more detailed statement of these facts, see *Breswick* v. *Briggs*, 135 F. Supp. 397 at p. 401-2; and the District Court's opinion at pp. 22-25, Alleghany's Statement as to Jurisdiction.

The basic fact here is that on the day Alleghany was found by the I.C.C. to have "acquired control of Central", (May 26, 1954, or June 14, 1954, the choice of date being immaterial),* it owned exactly 11,400 shares out of 6,447,410 shares of Central stock, while Young, Kirby, Murchison, and Richardson *personally* owned 1,000,000 shares.

The second basic fact is that, despite Alleghany's subsequent purchases of Central stock, 12 of the 15 Central directors elected on June 14, 1954 were and are still directors of Central and are neither officers nor directors of Alleghany nor under any legal responsibility to it. These 12 persons thus have, as stated by appellee Breswick to the I.C.C., "mathematical, legal and actual control of Central."

If it is true that Alleghany acquired by *subsequent* stock purchases from July 15, 1954 to December 9, 1955,** when

* May 26, 1954 was the date of the annual meeting of Central, and June 14, 1954 the date when the inspectors of election reported the vote.

** Alleghany's subsequent stock purchases of 15% of New York Central (Alleghany's Statement as to Jurisdiction, p. 19) do not overcome appellees' contention that Young and Kirby control Central, by reason of their own holdings in Central, their personal nomination of the above 12 persons, and their positions of Chairman and President of Alleghany. The I.C.C. made no findings on this issue.

it registered with the S.E.C., "the power to exercise control" within the meaning of Section 1(3)(b) of the Interstate Commerce Act, this is a fact to be found, *after* the legality of those subsequent purchases has been adjudicated.* For it may be that the I.C.C., when, as, and if it ever hears the evidence, will find that these subsequent acquisitions of 975,600 shares, and also the 11,400 were illegally acquired and may not be voted by Alleghany. In that case Alleghany will not have acquired "the power to exercise control."**

Either divestiture or sterilization of voting power then could appropriately be ordered by the I.C.C. But these considerations need not now be resolved, since Alleghany by registering with the S.E.C. on December 9, 1955 under the Investment Company Act, has in effect admitted it was not lawfully in control of Central.

The record below discloses that Alleghany's directors at no time authorized it to acquire control of New York Central, and in fact rejected such an acquisition in favor of it being taken by Young and Kirby individually.

Alleghany has openly admitted in proceedings in the Supreme Court of the State of New York that "at no time" did its directors authorize it to acquire control of

* If Alleghany was a non-registered investment company, as is now the admitted fact, during the period it acquired the 987,000 shares, their acquisition violated Section 7(a)(2) of the Investment Company Act. If it acquired control or controls of Central during that period, the acquisition of the power to control and the exercise of it violate Section 7(a)(5). Cf. *Alleghany Corp.* v. *James Foundation*, 214 F. 2d 446, at 450.

** Appellees do not concede that the subsequent acquisition of 975,600 shares by Alleghany when compared with the present personal ownership of 400,000 shares by Young and Kirby and 150,000 shares by Richardson (Murchison having in the interim sold his stock), and the fact that 12 of the 15 Central directors are not officers or directors of Alleghany, constitute "the power to exercise control" of Central, either in fact or law.

New York Central, "nor was any resolution passed authorizing any person to nominate any Alleghany representative to the Board of New York Central Railroad or to solicit on behalf of Alleghany, proxies for the election of any person to the Board of the Railroad," and Alleghany's directors actually rejected such control by Alleghany in favor of its being taken individually by Young and Kirby because in Young's opinion "control could perhaps be more easily secured by individuals than by a corporation."*

ARGUMENT

Assuming that 11 of appellant's 12 questions are not mooted as suggested by the foregoing statement, these and the single remaining question were correctly decided.

1. The District Court correctly held that after Alleghany divested itself of control of all carriers it became a non-registered investment company, subject to the jurisdiction of the S.E.C. under the Investment Company Act, and that it could not lawfully continue to act for the next 14 months under the jurisdiction of the I.C.C. and avoid S.E.C. regulation by virtue of the 1945 order authorizing the control that had been divested.

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* These facts appear, without contradiction, from an affidavit of Randolph Phillips affirmed December 21, 1955, submitted on the settlement of the final judgment herein, to which is attached Exhibit "A" (a certified copy of a true excerpt from the minutes of a meeting of Alleghany's directors held on January 19, 1954, placed in evidence in said state court proceeding) and Exhibit "B" (testimony of David W. Wallace, house counsel and Secretary of Alleghany, given in said state court proceeding).

Upon this point the District Court found:

> "On January 19, 1954, Alleghany divested itself of the C. & O. stock that it had theretofore held. The Nickel Plate stock had been earlier sold and the Pere Marquette merged with the C. & O. Upon the suggestion of those facts the I.C.C. requested Alleghany to show cause why the order of June 5, 1945, in Finance Docket No. 14692, should not be vacated and set aside insofar as it applied to and provided that Alleghany should be 'considered as a carrier'. Alleghany responded that it would be ready at a proper time to accept an order terminating its control of the C. & O. and requested that action regarding its status be withheld until the proceedings resulting in the order below could be begun. The I.C.C. allowed Alleghany a period of sixty days for that purpose and the proceedings under review were begun before its expiration.
>
> "In the proceedings under review the application alleged that Alleghany had 'recently' relinquished control of the C. & O. By the orders under review, the effective portions of the order of June 5, 1945, were expressly terminated and declared to be of no further force or effect.
>
> "Whatever might have been the terms of the order of June 5, 1945, they could not have conferred upon Alleghany qualifications to be 'considered as a carrier' which it did not possess. From the instant of Alleghany's relinquishment of control of the C. & O. and the Nickel Plate, plaintiffs here were entitled to the special protection which Congress has provided for stockholders in investment companies which do not control railroads. Although failure to apply for vacation of the order might estop Alleghany, it could not shield it from the S.E.C. and it would not be binding upon such third persons as stockholders of Alleghany. As to all except Alleghany, which had accepted the 1945 order as it read, its provisions for regulation by the I.C.C.

> after the factual basis for I.C.C. jurisdiction ceased, were empty fiat."
>
> (Alleghany's Separate Appendix to Statement as to Jurisdiction, pp. 15-16).

Alleghany contends that the shell of the 1945 order was sufficient to confer jurisdiction upon the I.C.C. *perpetually* unless specifically revoked by order. Both the legislative history of the rate section of the Act upon which Alleghany relies for this argument, and a subsequent decision of this Court show the emptiness of this contention. (See Alleghany's Statement as to Jurisdiction, pp. 37-8). A converse argument is made by it with respect to the 1945 S.E.C. order terminating its 1940 *registration* under the Investment Company Act. This, it is claimed, gave Alleghany perpetual immunity from the *non-registration* provisions of the Act until revoked by further order, an argument which the District Court held untenable (*Id.*, pp. 39-40).

2. The District Court correctly held that Alleghany, if it in fact acquired control of the New York Central system of 73 carriers, was required to make an application to the I.C.C. for approval of that acquisition, pursuant to the express requirements of Section 5(2) of the Interstate Commerce Act.

On this point the District Court found:

> "Under Section 5(2) I.C.C. approval is required for the acquisition of two or more carriers. The statute says 'carriers', not 'systems', yet the I.C.C. has here held that control of a previously affiliated system may be obtained by a non-carrier corporation without its approval."
>
> (Alleghany's Separate Appendix to Statement as to Jurisdiction, p. 18)

Division 4, however, specifically disagreed with this contention of the full Commission:

> "The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of two or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. (Footnote citing cases omitted.) That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue."
>
> (Alleghany's Separate Appendix to Statement as to Jurisdiction, pp. 66-67).

The list of the 73 separate carriers included in or affiliated with New York Central system is attached as an appendix to Division 4's Report (*Id.*, pp. 87-88).

3. Appellant misreads this Court's decision in U. S. v. Marshall Transport Co., 322 U. S. 31.

Alleghany argues that under the doctrine of this case it was not necessary for it as a non-carrier to file an application with the I.C.C. to acquire control of New York Central and its 73 affiliated carriers. Instead it argues that it can escape I.C.C. scrutiny of its control of Central and the necessity for a finding that such control is "consistent with the public interest" as required by Section 5(2)(b) of the Interstate Commerce Act, merely by joining itself as a party to the application of two subsidiaries of Central for an intra-corporate merger or lease. The *Marshall* case holds to the contrary, and in all other respects for which it is cited, it is, as the District Court found, "inapposite" (Alleghany's Jurisdictional Statement p. 36, pp. 46-48).

4. The District Court correctly held that the I.C.C. erred in finding that Alleghany controlled Central without approving that control and without making the requisite finding that such control was "consistent with the public interest" as required by Section 5(2)(b).

For the District Court's findings on this point, see Alleghany's Separate Appendix, pp. 21-22.

5. The District Court correctly held that the I.C.C.'s finding that Alleghany controlled Central was not supported by substantial evidence.

For the District Court's findings on this point, see Alleghany's Separate Appendix, pp. 22-26.

6. The District Court correctly found that plaintiffs-appellees had standing to review the I.C.C. orders.

For the District Court's findings on this point, see page 43, Alleghany's Statement as to Jurisdiction, and also see *Schwabacher* v. *U. S.*, 334 U. S. 182.*

7. The sole remaining question not mooted by Alleghany's registration with and application to the S.E.C. was correctly decided by the District Court. That question is, when a corporation disrupts the *status quo* while a motion for injunction is *sub judice* and issues securities pursuant to an administrative order whose invalidity must now be deemed established for the purposes of this

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* *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, 487, relied on by appellant, held plaintiffs there had no standing to review an order permitting abandonment of a railroad station because their "financial interest does not differ from that of every investor". Here plaintiffs, as minority common stockholders, disapprove a plan under which that class of stock alone yields conversion rights to new common stock to the preferred stockholders. Alleghany omits the fact, and Mr. Justice Harlan apparently overlooked, (100 L. Ed. 42) that the *Pittsburgh* case specifically excluded from the rule applied there "orders entered in cases of reorganization" (p. 487, also fn. 8).

case by Alleghany's abandonment of I.C.C. jurisdiction, was it proper for the District Court to enjoin their distribution and to take all necessary steps to preserve the *status quo* and to prevent the securities from passing into the hands of innocent persons?

To formulate the question is to answer it. Alleghany argues merely that if the law violator is more nimble than the court, he should be permitted to keep the fruits of violation or at least be allowed to pass them on to innocent persons. A similar problem arose in *S.E.C.* v. *Long Island Lighting Co., supra,* and both the District Court and the Court of Appeals by temporary restraining orders preserved the *status quo* and prevented consummation of the recapitalization plan that had been previously approved by the Public Service Commission of New York. They did this even though they resolved against the S.E.C. all of the litigated issues. As a result, when the case finally became moot after certiorari had been granted by this Court, there was no injury to the public by the injection of void securities into the channels of commerce. The plan was abandoned and the company's recapitalization was thereafter worked out through a new plan under the S.E.C. pursuant to law.

There was even more justification in the present case for the District Court's injunctions, since the first of them resolved all of the issues of law in favor of the plaintiffs, and also because Alleghany attempted to confront the Court with a *fait accompli.* As Judge Dimock stated:

> "On the expiration of five business days after the issuance of the I.C.C. order the stock could not be withdrawn. There was no provision postponing the consummation of the exchange in the event of court review of the I.C.C. approval.
>
> "A proceeding was brought before the I.C.C. for the approval of the exchange and plaintiffs sought

leave to intervene. Like the application for leave to intervene in the other proceeding, this was opposed by Alleghany and originally denied by the I.C.C. After a decision by Judge Walsh in another case, however, intervention in the preferred stock proceeding was permitted by the I.C.C. Plaintiffs filed a brief taking the position that approval should not be given, and closing with the request in substance that, if the I.C.C. should be disposed to grant approval, its order should be stayed long enough to permit plaintiffs to begin court proceedings before the exchange should be consummated.

"In spite of this request, the full Commission issued an order approving the exchange dated June 22, 1955. Alleghany learned of this about noon on June 23, 1955 and, although plaintiffs had already noticed in this case a motion for a preliminary injunction against assumption of jurisdiction by the I.C.C. immediately began issuing the new preferred stock to those who had accepted the exchange offer. Plaintiffs learned of the I.C.C. approval in the middle of the afternoon and, at 5:55 P.M. obtained a temporary restraining order against further exchange and against transfer of the new stock. By that time, however, more than half of the new stock had been issued. The restraining order has been continued as a preliminary injunction pending final hearing.

* * * * *

Moreover, Alleghany finds itself subject to hardships only because of its original omission to take into account the possibility of court review and its later precipitate action under the I.C.C.'s order while the question of the I.C.C.'s jurisdiction were *sub judice.*

"* * * Alleghany, pleading the cause of these innocent people as a reason why plaintiffs should be deprived of what I conceive to be their legal rights, seems to me an invader who drives before his soldiers a protective barrage of civilians." (Alleghany's Separate Appendix, pp. 49-50).

(A)

The District Court's order has had the practical result of freezing the preferred stock in the hands of the original stockholders. As a direct result of Alleghany's representation to Mr. Justice Harlan that it was not subject to S.E.C. regulation as an investment company, the stay granted by Mr. Justice Harlan admittedly proved to be "a futile act".

These facts are made clear when we compare Mr. Justice Harlan's decision rendered on application to this Court by Alleghany for *supersedeas* pending appeal from interlocutory injunction (100 L. Ed. Advance Reports, p. 36) and the order thereon (Alleghany's Separate Appendix, p. 52), with the following statement at pp. 28-29 of Alleghany's Statement as to Jurisdiction:

> "* * * despite a partial stay of the injunction with respect to transference of the 900,000 shares delivered prior to the effective date of the restraining order, trading in the entire issue of 6 percent convertible preferred stock continues suspended on the New York Stock Exchange and the National Association of Securities Dealers has admonished its member firms to refrain from taking part in any trading of this security. Alleghany preferred stockholders, whether they received physical delivery of their new stock certificates or not, thus have had their asset frozen and are unable either freely to sell or hypothecate their Alleghany preferred stock."

And in its Motion to Advance Case, Alleghany states (p. 4) "We think it is fair to conclude that Mr. Justice Harlan did not expect that the relief he granted would be a futile act."

Mr. Justice Harlan acted upon the representation by Alleghany that it was not an investment company and

therefore not subject to the prohibitions of that Act, including Section 7(a) which in terms barred the issue of such securities by unregistered investment companies, and Section 18(d) which in terms prohibits the issuance of a warrant or right to subscribe to common stock if the warrant or right expires later than 120 days after the issuance.*

It should be noted that the recapitalization plan gave 10 shares of new preferred stock for one share of old preferred and also gave each new share such a warrant or right for a minimum term of 15 years. This was attempted by giving the new preferred stockholders the right to convert each share of their new stock at any time up through at least the year 1970 into 4.7 shares (or 47 shares for every share of old Preferred) of Alleghany common stock upon payment of $3.75 per share of common. The right to buy one share of common, upon payment of $3.75, had a market value during June, 1955, the month when Alleghany sought to consummate the plan, of from $6.75 to $7.75.** Thus the right to buy 47 shares of common had a current market value of $317.25 to $364.25

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* At the oral argument before Mr. Justice Harlan on Alleghany's application for a stay, the general counsel of the S.E.C. (then William H. Timbers, Esq.), stated as *amicus curiae*:

> "Section 18(d) of the 1940 Act appears on page 34 of that statute. Your Honor has in mind that by the terms of this exchange offer there are certain conversion rights made available to the acquirers of the new preferred stock.
>
> "Under Section 18(d), if this company is subject to Investment Company Act regulations, those conversion rights may very well be construed as warrants given until, I think, 1970 or 1975, and certainly prohibited by the 120-day restriction of Section 18(d)."

** Some 2,000,000 of such rights or warrants were issued by Alleghany in prior years. They are traded on the American Stock Exchange, from whose quotations in the New York Times these figures are taken.

compared with a maximum legal claim of $237 per share for the old Preferred Stock.*

Mr. Justice Harlan, of course, was not aware that after Alleghany had represented to him that it was not an investment company within the meaning of the Investment Company Act, Alleghany would retreat from its representations by its registration with the S.E.C. within 3 months after Mr. Justice Harlan's order was made. It should also be noted that Mr. Justice Harlan based his partial stay of the preliminary injunction on the doctrine of balancing the equities, citing in connection therewith, *Yakus* v. *U. S.*, 321 U. S. 414. But that case referred solely to the granting of a preliminary injunction, and not to a case such as the present one where a final injunction has issued.

(B)

The District Court properly frustrated consummation of a plan under which common stock conversion rights currently worth roundly 49 million dollars in the market at the time of the I.C.C. order, were to be given to holders of the Old Preferred stock having a maximum legal claim of only 32 million dollars.

At no point in Alleghany's statement is there any reference to the market value of the conversion rights in June, 1955, when the I.C.C.'s final order approving the plan became public. On June 28, 1955, the market value of a warrant to purchase one share of Alleghany common stock upon payment of $3.75 per share** was as

* Of which $105 represented redemption value, and $132 accrued and unpaid dividends.

** If the common stock sold at $10.00 per share, the value of the right would be $6.25; at $11 per share, $7.25; at $11.50, $7.75 These computations assume the rights sold exactly at the mathematical difference between the market price of the Common Stock and the exercise price of $3.75. Actually, the rights may sell somewhat higher because they do not expire forthwith, if not exercised, but are without limitation as to time of exercise. The new Preferred Stock's conversion rights do not expire forthwith but are available for a minimum period of 15 years.

high as $7.75, as shown by quotations for such a warrant on the American Stock Exchange, and the value of 47 such rights was $364.25 compared with the Old Preferred stock's maximum legal claim of $237 per share. Thus, in effect, the preferred stockholders could have realized a profit of $127.25 for each share of their old stock. This represents an immediate gain in market value of more than 53% over the maximum legal claim of $237 per share of the old stock. For the entire class of Old Preferred stock this would have represented a windfall of roundly 17 million dollars. To frustrate this donation at the common stockholders' expense the District Court issued its restraining order and then its preliminary injunction, halting all trading and transfer of the new stock. In the circumstances of this case there could be no doubt about the propriety of such action.

(C)

Prior to the announcement of the recapitalization plan, Alleghany's chairman, Young, doubled his holdings of the Old Preferred stock.

See in this connection the following statement by the District Court in a collateral case:

> "It is also undisputed that shortly before the plan for the issuance of the new stock was announced, defendant Young more than doubled his personal holdings of the old stock to be refunded, increasing them from 5,179 shares to 11,087." (*Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, at 402-3).

By the time the reorganization plan was announced, Robert R. Young and Allan P. Kirby, the chairman and president of Alleghany respectively, owned approximately 24,000 shares, which with Mrs. Young's holdings of 3,738

shares, gave them 20% of the Old Preferred stock.* Thus 20% of the "windfall" of 17 million dollars, or $3,400,000 would have been realizable by these three persons except for the injunction.

(D)

This court is not an appropriate forum to untangle the complexities of half-delivered, half-undelivered and frozen stock created by Alleghany's defiant acts.

As previously mentioned there is now pending before the S.E.C. a proceeding retroactively to approve or exempt, subject to such conditions as may be imposed by the S.E.C., the heretofore illegal issuance of the new preferred stock (See p. 13, *supra*). Either this expert administrative body or the District Court is the proper forum to untangle the various problems created.** The lower court, it should be noted, is sitting as a court of equity as well as a reviewing court in view of Alleghany's disruption of the *status quo* pending the motion for injunction. Thus it is a proper and competent forum to unfreeze this stock by directing rescission and otherwise implementing a return to the *status quo ante* by utilizing in full the resources of a court of equity.***

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* See Alleghany's Separate Appendix, p. 109.

** Appellees have taken the position before the S.E.C. that intervening equities, Section 18(d) of the Act, and other considerations would make a retroactive approval unlawful. Appellees also assert that S.E.C. can assume no jurisdiction over the plan at least until this Court has issued a final order on the pending appeals. Depending on the character of that order depends the question of whether the S.E.C. can assert any lawful jurisdiction over the plan or whether the District Court has exclusive jurisdiction.

*** In its First Supplemental Opinion (Alleghany Statement as to Jurisdiction, p. 57), the District Court stated in this connection: "Should the Supreme Court reverse our final order consideration of that matter will not be necessary; should there be no appeal from our order, or if the Supreme Court should affirm our order, we will, unless the Supreme Court otherwise directs, consider the matter on the application of the plaintiffs or intervenor-plaintiffs."

"And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Virginian R. Co. *v.* System Federation, R.E.D. 300 U. S. 515, 552, 81 L. ed. 789, 802, 57 S. Ct. 592. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' Hecht Co. *v.* Bowles, 321 U. S. 321, 329, 88 L. ed. 754, 760, 64 S. Ct. 587. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." *Porter* v. *Warner,* 328 U. S. 395, at 398."*

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* And in the same case at page 398:

"Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available.[2]

"2. But if a defendant with notice of a pending injunction proceeding completes the acts sought to be enjoined, the court of equity may restore the status quo by means of a mandatory injunction. *Texas & N.O.R. Co.* v. *Northside R. Co.,* 276 U. S. 475, 72 L. ed. 661, 48 S. Ct. 361; *Porter* v. *Lee,* 328 U. S. 246, ante, 1199, 66 S. Ct. 983."

CONCLUSION

The direct appeal from that portion of the final judgment enjoining, setting aside, annulling or suspending the four orders of the Interstate Commerce Commission has been rendered moot and should be dismissed.*

The judgment of the District Court enjoining consummation of the preferred stock plan and all trading and transfer of the new securities is correct and should, without further briefs or argument, be affirmed.

Respectfully submitted,

GEORGE BRUSSEL, JR.,
Attorney for Appellees
Breswick & Co. and
Myron Neisloss.

RANDOLPH PHILLIPS,
Appellee, Pro se.

Dated: March 15, 1956.

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* The judgment below should not be disturbed, since otherwise appellees might be deprived of the full legal consequences of Alleghany's admissions. Preservation of the final judgment is required because of Alleghany's disruption of the *status quo*, and the necessity of relying upon the District Court's plenary equity powers to restore the *status quo ante*. The S.E.C. has no such powers, nor has it the power to bring holders of the stock before it. Mootness should not be used, therefore, as a means of ending the injunction and facilitating the consummation of the illegal plan. It is the practice of this Court in moot cases to make such disposition of the whole case as justice may require. *Walling* v. *Reuter*, 321 U. S. 671, 677.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 36

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' STATEMENT IN OPPOSITION TO MOTION TO ADVANCE CASE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 692

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' STATEMENT IN OPPOSITION TO MOTION TO ADVANCE CASE

Alleghany claims to be seeking "the speediest possible relief to its security holders." Under the peculiar circumstances of this case this relief can be obtained only by an affirmance of the judgment of the District Court or by a dismissal of the appeal.

Despite Alleghany's inequitable conduct below in attempting to consummate the preferred stock plan while a motion for a preliminary injunction was pending before the District Court, Alleghany deems it proper to request

this court to advance this case for argument even before the court has noted probable jurisdiction.

By its own reckless conduct Alleghany has created the plight in which the preferred stockholders now find themselves.* Nevertheless, at the expense of the orderly administration of justice in this case, Alleghany considers itself entitled to a priority over all of the other important causes pending before this court.

Under the procedure provided by the rules it would not be possible to have a determination of the merits of this case prior to the October 1956 Term even assuming, *arguendo*, the denial of appellees' motion to affirm or to dismiss. In order to accommodate the Alleghany proposal to advance this case for argument during the current term, the motion to affirm or to dismiss must be denied, probable jurisdiction must be noted, the designations and cross-designations of the printed record must be filed, the Clerk must print a voluminous record, appellees must prepare and file their brief and the court must hear argument and render its opinion reversing the lower court, all within the two and one-half months' period remaining before the court rises for the summer recess.

We submit that the record in this case does not support Alleghany's suggestion that "hasty briefing and argument", not to mention decision, "is compatible with the orderly administration of justice" by this court. *Land* v. *Dollar*, 341 U. S. 737, 739-740. Furthermore the dependency of other proceedings such as the common stockholders' derivative action now pending in the District Court (*Breswick & Co.* v. *Briggs*, 135 F. Supp. 397) should be "a further consideration militating against premature disposition of the issues presented" (Id., p. 739).

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* See Judge Dimock's findings at pp. 49-50, Alleghany's Separate Appendix.

If appellees' motion to affirm or to dismiss be granted the District Court will be able to discharge its equity functions with respect to any residual matters still requiring determination, and to restore the *status quo ante* its restraining order of June 23, 1955 by directing a restoration to the now frozen preferred stockholders of the securities exchanged for the illegally issued preferred stock. With the substantive questions disposed of by appropriate action of this court, a new plan of capitalization may then lawfully be considered under the jurisdiction of the Securities and Exchange Commission.

Apparently Alleghany would prefer to have this court overlook the mootness of the issues in this case and to have the Securities and Exchange Commission, by retroactive order, place its imprimatur upon the plan illegally authorized by the I.C.C. In such manner it would obtain judicial sanction, given in haste, to its own reckless and ill-advised conduct.

The motion to advance should be denied.

Respectfully submitted,

GEORGE BRUSSEL, JR.,
Attorney for Appellees
Breswick & Co. and
Myron Neisloss.

RANDOLPH PHILLIPS,
Appellee, Pro se.

Dated: March 15, 1956.

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IN THE

Supreme Court of the United States

October Term, 1955

No. ~~692~~ 36

ALLEGHANY CORPORATION, *Appellant*,

vs.

BRESWICK & CO., ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of New York

APPELLEES' REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' STATEMENT SUGGESTING MOOTNESS AND MOTION TO AFFIRM OR DISMISS

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APPELLEES' REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' STATEMENT SUGGESTING MOOTNESS AND MOTION TO AFFIRM OR DISMISS

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1. Since the time for appeal has expired and neither the United States nor the New York Central Railroad Co. has appealed, the judgment below is final as to these parties.

The failure of these two parties to appeal will, we assume, not be denied. Inasmuch as the final judgment was entered on December 23, 1955, and the motion for a new trial denied on January 27, 1956, the time has expired for appeal by these parties.

2. Alleghany's suggestion that, if its appeal be ruled moot, the judgment below be vacated and the complaint dismissed ignores the finality of the judgment with respect to the United States and the New York Central Railroad Co.

To follow this suggestion of appellant would thus obviously not be pursuant to the practice of this Court in the cases cited by Alleghany. As pointed out in our main brief, it would destroy appellees' injunctive position and unloose 47 million dollars of void securities upon an innocent public.

3. Alleghany's argument against mootness mistakenly applies rulings of this Court.

Alleghany cites four cases for the proposition that obedience by a defendant to a court's determination does not moot a case "especially when failure to obey would result in criminal liability or the forced cessation of all essential activity." (p. 3). But all the District Court did was to set aside the I.C.C.'s orders, annul them, and enjoin consummation of the plan pursuant to those orders. "Faced with this holding." states counsel (p. 2), "Alleghany, unless it filed under protest with the S.E.C. a notification of registration (under the Investment Company Act), would have had to shut its doors and give up all of its business while awaiting the outcome of its appeal to this Court."

But Alleghany did none of these things after the issuance of the preliminary injunction on July 21, 1955 and waited more than 4 months thereafter until it filed its registration with the S.E.C. on December 9, 1955.

In *Porter* v. *Lee*, 328 U. S. 246, the case was not moot because the issue of future violations was still before the Court. (p. 252). Here there is no such issue. Regis-

tration with the S.E.C. is final, and can only be terminated by a new proceeding. (Appellees' Statement and Motion, p. 9). Hence, there is no mere submission "to perform the judgment of the Court . . . . without changing the rights of the parties in any other respect", *Dakota County* v. *Glidden*, 113 U. S. 222 at 224.

The rights of all the parties have changed by virtue of the S.E.C. registration, which invests all parties with the rights and privileges accorded by the Investment Company Act. Indeed, the current proceeding retroactively to legalize the plan now in progress before the S.E.C. (Appellees' Statement and Motion, pp. 13-14) is the plainest of evidence of this change in rights, since prior thereto the Interstate Commerce Act alone was the source of the only orders approving the plan.

Nor was Alleghany's submission of the plan to the S.E.C. "merely obedience to the judgment now here for review", *Bakery Drivers' Union* v. *Wagshal*, 333 U. S. 437. As previously noted the judgment merely set aside the I.C.C.'s orders, annulled them, and enjoined the consummation of the plan pursuant to those orders. Alleghany did not have to submit retroactively its plan to the S.E.C. for approval but could have abided its appeal here. Instead it did what Long Island Lighting Company did, that is abandon one jurisdiction over its plan and seek another, which action this Court held mooted its case. (Appellees' Statement, p. 10). Long Island, it should be noted, was thus submitting to the jurisdiction of the S.E.C. under the Public Utility Holding Company Act, whose non-registration section (Section 4) is almost the identical equivalent of the non-registration section

(Section 7(a)) of the Investment Company Act, and is equally punitive and onerous.

Alleghany's quotation from *U. S.* v. *W. T. Grant Co.*, 345 U.S. 629, 632 omits the opening words which show that it is a recital that "Both sides agree to the abstract proposition that, etc.", and not a holding of this Court. There also this Court noted "The defendant is free to return to his old ways," and thus the case was not moot. (p. 632). Here, we repeat this is not true, since Alleghany is not free to return to I.C.C. jurisdiction unless the S.E.C. permits that course by a specific order terminating its registration under Section 8(f) of the Investment Company Act. (Appellees' Statement and Motion, p. 9).

5. In view of the finality of the judgment below as to the United States, and The New York Central Railroad Company, the judgment below may not properly be vacated, as suggested by Alleghany, if its appeal is moot.

We believe this proposition so evident as not to need further comment. (Appellees' Statement and Motion, p. 31 and footnote).

Respectfully submitted,

GEORGE BRUSSEL, JR.,
Attorney for Appellees
Breswick & Co. and
Myron Neisloss

RANDOLPH PHILLIPS
Appellee, Pro se.

Dated: April 19, 1956.

CLERK, Supreme Court, U. S.
MAR 9 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 692 36

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM OF APPELLANTS JOSEPH S. GRUSS, ET AL., ON BEHALF OF THEMSELVES AND OTHER 6% PREFERRED STOCKHOLDERS SIMILARLY SITUATED, IN OPPOSITION TO APPELLEES' STATEMENT SUGGESTING MOOTNESS.

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Attorney for Appellants,
JOSEPH S. GRUSS, *et al.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 692

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

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The appellants, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership doing business as Gruss & Co., who have duly filed their Notice of Appeal herein on behalf of themselves and other 6% preferred stockholders similarly situated and who, in the interest of expediting the appeals herein, have applied to this Court for leave to join in the Jurisdictional Statement filed by the appellant,

Alleghany Corporation, submit this memorandum under the above entitled caption in opposition to appellees' application to dismiss the appeals herein upon the ground of mootness, etc.

The Issues Presented by the Preferred Stockholders' Appeal Herein are not Moot.

Preliminary Statement

Appellees urge that the appeals herein are moot because the Alleghany Corporation (hereinafter "Alleghany") in December of 1955 "voluntarily" registered with the SEC following the decision of the District Court, whereby it is claimed that Alleghany conceded—retroactively—that the ICC had no jurisdiction in May and June of 1955 to enter the orders annulled by the judgment below.

Treating the jurisdiction of the ICC as a "privilege" that may be waived, appellees next indicate that while Alleghany's filing with the ICC was "empty fiat" as far as the appellee common stockholders were concerned, its registration with the SEC is binding upon the preferred stockholders so as to render their appeal moot. To bolster their obviously untenable position appellees intimate—without any foundation—that these preferred stockholder appellants joined other preferred stockholders in an application to the SEC to approve the exchange offer. This, too, is suggested as an acquiescence in the determination below.

Half hidden in appellees' memorandum is the admission that one question remains unmooted: the issue respecting the propriety of the injunction below against the distribution of the new preferred stock. To the preferred stockholders, if not to other parties, that is the vital issue in this case. All others are subordinate.

Appellees neatly dispose of this concededly non-mooted question by suggesting that the freezing of the fully issued and partly distributed new preferred stock was due to Alle-

ghany's misconduct. Apart from the question whether Alleghany committed any wrong in distributing most of the stock prior to the issuance of an *ex parte* stay, appellees overlook the fact that the rights of the preferred stockholders can no more be determined or tainted by the action of the management of Alleghany than can those of the common stockholders.

Similarly, having convinced the trial court that the common stockholders were not bound by orders procured by Alleghany, they can hardly assert now that Alleghany's registration is binding on other classes of stockholders so as to deprive them of their right of appeal.

Alleghany did not voluntarily acquiesce in the SEC jurisdiction; it certainly did not do so retroactively.

Obviously, Alleghany did not "voluntarily" acquiesce in the decision below by registering with the SEC when that very decision made it necessary to do so. Alleghany had to register or cease to do business or face severe penalties if this Court were eventually to affirm the District Court's holding that Alleghany is an investment company subject to the Investment Company Act.

When it registered with the SEC, Alleghany filed a letter in which it pointed out that it was doing so under protest and that it was not abandoning the rights it was asserting on the appeal herein.

Alleghany's action in the face of a final judgment of the District Court is not to be compared with the truly voluntary action of the respondent in *SEC* v. *Long Island Lighting Company*, 325 U. S. 833. There, the Lighting Company, apparently the only party defendant, had *prevailed* in the Court of Appeals (148 F. 2d 252) and, after this Court had granted *certiorari*, (324 U. S. 837) voluntarily acquiesced in the position of the SEC, leaving nothing to be reviewed by this Court. Here, Alleghany was compelled by the Investment Company Act and the decision below to register

with the SEC and it did so while simultaneously proceeding with its appeal, thereby questioning the validity of the judgment below and indicating non-acquiescence in it.

Assuming, *arguendo*, that Alleghany intended to acquiesce in future regulation by the SEC, that would hardly constitute an admission that the ICC six months earlier did not have jurisdiction; nor can it be construed as an admission that the court below had authority to enjoin the distribution of the preferred stock herein—a matter of the greatest concern, to some extent to Alleghany itself, but much more so to these appellants.

No act of Alleghany's could destroy the right to appeal of the preferred stockholders or the ICC

The United States and the ICC were the only parties defendant named in the original complaint herein. Having demonstrated that their rights and interests were involved in plaintiffs' suit below, these preferred stockholders and other groups of stockholders were permitted to intervene. So also Alleghany.

The independent and distinct interests of these preferred stockholders has been recognized throughout this action. Shares of stock which they would otherwise be entitled to receive, transfer and use as collateral have been frozen by the judgment below—some in the hands of the exchange agent and some in the hands of the holders.

How then can it be said that one intervening defendant could waive the rights of all these other parties defendant to obtain a review of the judgment below? One intervening defendant could no more waive the rights of the other defendants than could the failure of certain defendants below to appeal to this Court affect the right of others to prosecute an appeal.

Plaintiffs can hardly take the position that the preferred stockholder appellants are bound by the action of Alleghany in allegedly acquiescing in the jurisdiction of the SEC. They

themselves successfully contended in the District Court that Alleghany's acquiescence in ICC regulation was not binding upon them.

This may be seen from the quotation from the District Court's opinion set forth at pages 19 and 20 of appellees' memorandum, which concludes with the following:

> "'* * * Although failure to apply for vacation of the order might estop Alleghany, it could not shield it from the S.E.C. and it would not be binding upon such third persons as stockholders of Alleghany. As to all except Alleghany, which had accepted the 1945 order as it read, its provisions for regulation by the I.C.C. after the factual basis for I.C.C. jurisdiction ceased, were empty fiat.'"

Even more patent is the unreasoning position of appellees on this subject when applied to the appellant Interstate Commerce Commission. Assuming that Alleghany were lawfully required to be subject to supervision and control by the ICC, it is inconceivable that Alleghany could waive the obligation—or "privilege", as appellees would call it. Such a waiver would hardly dispose of the paramount public interest in the matter or bind the ICC so as to destroy its right to assert its jurisdiction or its right to obtain a review of the decision below.

Application by "some" preferred stockholders for SEC approval of the exchange offer does not affect the right of these appellants to a review of the decision below.

Appellees also cite the fact that "some" preferred stockholders have made a formal application to the SEC, asking an exemption or approval of the exchange offer. It is then indicated that "certain" appellants have joined in that application (p. 13). The appellants herein *did not* join in that application. However, even assuming that they had, we urge that the filing of that application does not represent an acquiescence in the decision below. This, because at page 6 of the application the SEC is asked to remove any

obstacles to the issuance and transfer of the New 6% Preferred Stock

> "without awaiting the determination of such appeal [the appeal herein] and without prejudice thereto, * * *"

In light of this reservation in the application, the quoted statement of the attorneys for the applying preferred stockholders that "the Application proceeds on the assumption of such affirmance" of the decision below by this Court is to be interpreted as meaning that the application was being made to meet the contingency which would arise if this Court affirmed the decision below.

In other words, against the possibility that this Court might not grant them relief, some preferred stockholders are seeking whatever relief they can get from the SEC, thus to expedite the unfreezing of their securities.

The fundamental issue on this appeal is concededly not moot.

After claiming, at considerable length, that the appeal to this Court has become moot, appellees finally concede, (p. 22), that there is one

> "remaining question not mooted by Alleghany's registration with and application to the S. E. C."

But this so called "sole remaining question"—whether the District Court was justified in annulling the order approving the exchange offer and in enjoining the completion of the distribution of $40,000,000 of widely held new preferred stock—is the very heart of this case.

Appellees' only footing—however precarious—for objecting to the status of Alleghany as a non-carrier subject to ICC jurisdiction, lies in their claim that the order of the ICC approving the exchange offer was void and that the

exchange might eventually cause dilution of the common stock. In upholding appellees' position and in distinguishing *New York Central Securities Corp. v. U. S.*, 54 F. 2d 122, affd. 287 U. S. 12, the court below stated:

> "We think that case at most holds that a stockholder cannot, in a suit under the Urgent Deficiencies Act, assert harm to the corporation; it does not hold that he cannot assert a threatened direct harm to himself as a stockholder. Such a threatened harm exists here, since the right to convert the preferred into common stock may dilute the interest of plaintiffs as common stockholders of Alleghany." (Appendix A, Alleghany's Statement as to Jurisdiction, p. 42).

These preferred stockholders are not primarily concerned with whether Alleghany is regulated by the ICC or the SEC. What really concerns them is their unhappy plight resulting from the freezing of their securities by the injunctions granted below. The situation of the preferred stockholders in this regard gave pause not only to Judge Hincks, who dissented from the opinion granting a temporary injunction, and Justice Harlan, who stayed it in part, but also to Judge Dimock, who wrote the prevailing opinion granting the temporary injunction. Judge Dimock's opinion denying a stay of the temporary injunction is quoted at length at pages 23 and 24 of appellees' memorandum. Omitted from that quotation and represented only by "* * *" is the following comment by Judge Dimock:

> "What makes the question perplexing is the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return." (Alleghany's Separate Appendix, p. 50).

Judge Dimock refused to relax the injunction putting the blame for the plight of the "innocent" stockholders on Alleghany.

In granting a partial stay, Mr. Justice Harlan also was "most impressed with the prejudice which continuance of

this injunction will work on the preferred stockholders." He therefore stated:

> "But for the fact that staying the injunction to the full extent that it affects the preferred stock issue might render moot the whole appeal from that part of the injunction, I would be disposed to grant that relief." (—— *U. S.* ——, 100 L. Ed. Adv. Rep. 36, 41)

Mr. Justice Harlan indicated disagreement, however, with Judge Dimock's apparent view that it was a sufficient answer to say that Alleghany was responsible for the freezing of the securities. On this issue, he declared:

> "I am not unmindful of the plaintiffs' contention that Alleghany proceeded with the preferred stock plan after notice of the plaintiffs' objection and proposed injunction suit, but I do not think this can be laid at the door of the preferred stockholders so as to disentitle them to consideration of their predicament." (Ibid.)

A further inconsistency in appellees' position lies in the fact that they do not ask for a complete dismissal on the ground of mootness but request that this "sole remaining question" be referred to the District Court so that it may "untangle the complexities of half-delivered, half-undelivered and frozen stock" brought about by the injunction below.

This request, which, if granted, would require this Court to depart from its usual procedure in moot cases—to vacate the injunction and to reverse with directions to dismiss*—is eloquent proof that the issues involved on this appeal are not moot.

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* See *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39-40; Compare *S.E.C.* v. *Long Island Lighting Company*, 325 U. S. 833; see Note, *Disposition of Moot Cases by the United States Supreme Court*, 22 U. of Chi. L. Rev. 77 (1955). This proceedure has added justification in cases dealing with administrative rulings. Ibid., at 86.

Were the issues moot, whatever disposition this Court would make of them could have no effect on any of the parties to this action.*

Thus it is apparent that the basic issue concerning the propriety of the injunction against the distribution of Alleghany's 6% preferred stock is not moot. This is conceded. It is likewise clear that no act of acquiescence on the part of Alleghany or its stockholders has rendered moot any of the other questions presented for review on this appeal.

CONCLUSION

The right of Alleghany, the preferred stockholders and the other appellants to carry on their appeals herein has not been waived. The issues involved herein are not moot and since appellees do not question the substantiality of the issues or the jurisdiction of this Court, their motion to affirm or dismiss should be denied.

Respectfully submitted,

HAROLD H. LEVIN,
Attorney for Appellants,
JOSEPH S. GRUSS, et al.

Dated: March 29, 1956.

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* A frequently quoted judicial definition of a moot case is that in *Ex Parte Steele*, 162 Fed. 694, 701 (N. D., Ala., 1908)

> "[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."

See also 22 U. of Chi. L. Rev. *supra* at 78 "A decree in a case moot on appeal by definition cannot directly effect any change in the legal rights of the parties to the action."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~1052~~ 36

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' STATEMENT SUGGESTING MOOTNESS and MOTION TO AFFIRM OR DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 692

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ARGUMENT

The Questions Presented to this Court Are Not Moot.

Section 7(a) of the Investment Company Act* prohibits virtually all business activity in interstate commerce by an unregistered investment company. It would prevent the posting of a business letter or the making of a telephone call, since it mandates that unregistered companies shall

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* 54 Stat. 802 (1940), 15 U. S. C. A. 80a-7(a)(1) through (5).

not "engage in any business in interstate commerce." It invokes criminal and civil penalties for its bad-faith violation. See e.g. 54 Stat. 846 (1940), 15 U. S. C. A. 80a-49.

The three-judge District Court, and we quote from pp. 7 and 8 of appellees' "Statement Suggesting Mootness": "• • • held • • • that Alleghany was a non-registered investment company • • •." Faced with this holding, Alleghany, unless it filed under protest with the SEC a notification of registration, would have had to shut its doors and give up all of its business while awaiting the outcome of its appeal to this Court. Because Alleghany controls The New York Central Railroad System, even shutting its doors would not have necessarily spared it from the sanction of the Investment Company Act, since 15 U. S. C. A. 80a-7(a)(5) makes illegal "control [of] any company which is engaged in any business in interstate commerce". ICC, USA and Alleghany were of the view that it was not within the jurisdiction of a three-judge court set up solely to review orders of ICC (*U. S.* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 535-536 (1946); and *Pittsburgh & West Virginia Ry. Co.* v. *U. S.,* 281 U. S. 479, 488 (1930)) to determine Alleghany's status as being that of an unregistered investment company, which the Court below did, saying:

> "• • • at the very latest, on May 24, 1955, • • • Alleghany was then forthwith within the coverage of the Investment Company Act." (39)*

Yet as a consequence of this holding Alleghany could do nothing else but file a notification of registration as an investment company with the SEC. Attached to Alleghany's motion to advance, at pp. 10-11, is a copy of Alleghany's letter protesting the necessity of registration occasioned by the decision below, filed with the SEC on December

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* References without letter are to pages in Alleghany's Jurisdictional Statement; references preceded by "A" are to the pages in the Appendix to Alleghany's Jurisdictional Statement.

9, 1955, simultaneously with Alleghany's notification of registration.*

Obedience by a defendant to a court's determination does not moot a case, especially when failure to obey would result in criminal liability or the forced cessation of all essential activity.

Porter v. *Lee*, 328 U. S. 246 (1946);
Bakery Drivers' Union v. *Wagshal*, 333 U. S. 437 (1948);
Dakota County v. *Glidden*, 113 U. S. 222 (1885).

This Court, at p. 442 of the *Bakery Drivers' Union* case, *supra*, said:

> "A preliminary claim must be met, that the case has become moot. * * * The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits."

And in *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953), this Court said:

> "* * * voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."

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* Appellees repeatedly charge (e.g., Appellees' Statement Suggesting Mootness, pp. 8-9) that Alleghany's Secretary (Wallace) testified in a collateral litigation that Alleghany's resignation with SEC was "unconditional". As the portion of Wallace's testimony quoted by appellees itself discloses the alleged conflict dissolves in semantics. Appellees had always claimed that they, as stockholders of Alleghany, were entitled to the protection of SEC regulation of Alleghany. Mr. Wallace was saying that they now had this alleged protection pending appeal to this Court, fully and not partially; and that in this sense it was "unconditional".

In addition, the ICC has filed a notice of appeal in this cause, and therefore there can have been no extinguishment of the rights of the public in and to a determination of the question presented by this appeal. Acts of private defendants (assuming, *arguendo*, that such acts would in the absence of public rights bring about mootness) cannot moot the determination of the questions that a governmental body seeks to bring before this Court. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 309 (1897); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911). See, also, *Ford Motor Co.* v. *U. S.*, 335 U. S. 303, 313 (1948).

Just as Alleghany had no choice after the decision below but to submit to SEC, it had no choice but to submit originally to the continuing jurisdiction of ICC. ICC said in its first report on Alleghany's status:

> "Without our further order, the voluntary action of Alleghany on and after January 19, 1954 divesting itself of its stockholdings and control of Chesapeake, and removing from deposit in the voting trust agreements, the controlling holdings of other carriers' stocks and disposing of such holdings, could not operate to alter the status of Alleghany as a carrier subject to the Act.
>
> "The foregoing analysis is premised upon the theory that Alleghany's status as a carrier cannot be modified or otherwise altered unless and until we order an appropriate change." (A. 66)

If it is determined on this appeal that Alleghany at all times since 1945 remained properly the continuing subject of ICC's regulation, which, as just indicated, was the view of ICC, then Alleghany's perforce filing of its notification of registration with SEC will be a nullity. The validity of ICC's view that it was to continue to regulate Alleghany, and Alleghany's obedience thereto, together with the consequences that flow from sustaining this view remain undetermined until this Court passes on them.

If this Court should reverse the District Court and sustain our view that Alleghany was always subject to ICC's jurisdiction, then §3(c)(9) of the Investment Company Act of 1940,* which exempts from that statute's scope corporations subject to ICC's jurisdiction, would of necessity render Alleghany's registration with SEC a nullity. Certainly Alleghany could not, if it belonged under ICC's wing, deprive that agency of jurisdiction merely by its own act. The fundamental issue in this case—whether ICC lawfully asserted jurisdiction over Alleghany—thus remains unchanged. It is a justiciable issue. *Rochester Telephone Corporation* v. *U. S.*, 307 U. S. 125 (1939).

It is indicated at pp. 13 and 14 of appellees' "Statement Suggesting Mootness" that "* * * Alleghany voluntarily filed with the SEC an application * * *" for *nunc pro tunc* approval of the issuance of its 6% convertible preferred stock and that this constitutes a waiver of Alleghany's position that ICC had jurisdiction to approve such issuance. Not only did Alleghany upon filing the notification of registration protest the necessity of having to file same, but in the later application to SEC just mentioned Alleghany said:

> "In making this application Alleghany does not concede the correctness of the holdings in Breswick & Co., et ano. *v.* United States of America, et al. (decision rendered November 18, 1955), or any implication flowing from said holdings. Reference is again made to the filing of a notification of registration by Alleghany with this Commission on December 9, 1955, and to the filing with this Commission on the same day of a letter of Alleghany and to the conditions in said letter. Each and every condition in said letter is preserved by Alleghany and not waived in the making of this application."

The theory underlying this SEC application was not that Alleghany believed SEC had jurisdiction, but that

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* 54 Stat. 798 (1940), 15 U. S. C. A. 80a—3(c)(9).

since ICC had already approved the stock, if the only other agency that could have any conceivable interest therein were also to affix its imprimatur, the District Court would be compelled to lift the injunction against delivery of the stock. In other words, the purpose of the application was solely to meet the District Court's objection to the delivery of the 6% stock. Alleghany's SEC application, of course, did not proceed " 'on the assumption of affirmance' by this Court", as is suggested by appellees on pp. 2 and 14 of their "Statement Suggesting Mootness". Neither did Alleghany effect a "joinder" (as appellees there also state) in the application to SEC of its preferred stockholders. Alleghany merely asked that its own application be heard at the same time as the applications of its stockholders and agreed with their interpretation of certain relevant Investment Company Act sections. In any case, Alleghany's SEC application, though filed subsequent to the preferred stockholders' application, was filed prior to the stockholders' brief from which appellees quote and so could hardly have adopted statements therein. Even were the fact as to Alleghany's non-joinder in the preferred stockholders' SEC application otherwise, the preferred stockholders' application in so many words took cognizance not only of the effect on their application of "affirmance" but also the effect of "reversal".

In any case, this SEC application can at best only validate the 6% preferred stock. It can do no more. It comes with especially ill grace for appellees, Phillips and Breswick, now to contend that Alleghany's SEC application to help its stockholders has brought about or can bring about mootness, when earlier in this very month they suggested the contrary to the SEC. In paragraph 3 of their application to that Commission to stay its hearings with respect to the 6% preferred stock until after final action by this Court, they made the contention that until this appeal is finally decided, the legal rights of Alleghany and its stockholders cannot be determined by SEC.

The District Court has recognized the non-mootness of this cause by conceding the possibility of the ICC reasserting its jurisdiction over Alleghany in the Boston & Albany proceeding (62). Whether or not the defects found by the Court below to be present in that proceeding do or do not exist and whether or not they need or need not be remedied is far from a moot question. The answer depends entirely, as the District Court recognized in its January 27, 1956 opinion (60-63) handed down with knowledge of, and seven weeks after, Alleghany's registration with SEC, upon whether or not the District Court's interpretations of § 5* and § 15 (2)** of the Interstate Commerce Act are valid. Only this appeal can resolve these questions.

Furthermore, Appendix II to the District Court's opinion of November 18, 1955 was written by that court solely for the purpose of giving its views to this Court of what the District Court claims were procedural errors in the ICC proceedings. That appendix proceeds on the theory that if the District Court is wrong in its main holding, further hearings will be required before the ICC on remand. None of the so-called mootness producing events attributed by appellees to Alleghany in their "Statement Suggesting Mootness" would destroy the need for a remand to ICC if the District Court be found by this Court to have been in error in its main holding, but correct in its alternative holding. For once it be found that the District Court's main holding is in error, it is necessarily also decided that Alleghany is under ICC's jurisdiction. Its forced registration with SEC would then be of no effect, since companies subject to regulation by ICC and securities of such companies, are by statute exempted from SEC's jurisdiction.†

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* 54 Stat. 905 (1940), as amended by 63 Stat. 485 (1949), 49 U. S. C. A. 5.

** 41 Stat. 485 (1920), 49 U. S. C. A. 15.

† Investment Company Act § 3(c)(9), 54 Stat. 798 (1940), 15 U. S. C. A. 80a—3(c)(9); Securities Act of 1933 § 3(a)(6), 49 Stat. 557 (1935), 15 U. S. C. A. § 77c(a)(6).

Perhaps nothing more clearly demonstrates the continuing vitality and non-mootness of this cause than appelees' statement at p. 29 of their "Statement Suggesting Mootness." There they say:

> *"This court is not an appropriate forum to untangle the complexities of half-delivered, half-undelivered and frozen stock created by Alleghany's defiant acts."*

If nothing else, this statement necessarily recognizes that there remain non-moot matters to be "untangled". But the statement and the discussion arising thereafter show more. They show that the District Court, from which this appeal is taken, is in appellees' view the "proper and competent forum to unfreeze this stock by directing rescission and otherwise implementing a return to the *status quo ante* by utilzing in full the resources of a court of equity" (p. 29 of appellees' "Statement Suggesting Mootness"). Brushing aside the fact that the three-judge District Court is a limited review court and is not possessed of "in full the resources of a court of equity," this startling statement, in effect, says that Alleghany must be deprived of an appeal to this Court on the question of the validity of the preferred stock. Surely, if the Court below is competent to throw a cloud over this stock's validity, this Court must be left free to review that determination. Appellees go on to say (p. 29 "Statement Suggesting Mootness") that perhaps "• • • this expert administrative body [SEC] • • • is the proper forum to untangle the various problems created." Yet Breswick and Phillips, who *now* claim that SEC should regulate Alleghany's issuance of securities, and who persuaded the District Court that Alleghany should be regulated in that regard by SEC and who *now* charge mootness because they claim SEC is doing some regulating, *just one week* before the date of their "Statement Suggesting Mootness" (March 8, 1955) made a motion before SEC requesting that body to grant them time to

apply to this Court for a writ of prohibition on various grounds. Their motion papers said,

> "* * * applicant-intervenors request that the Commission postpone the date of hearing herein until they have had an opportunity to apply to the Supreme Court of the United States for a writ of prohibition pursuant to Section 1651(a) of Title 28 U. S. C. on the ground that such writ is necessary to preserve the exclusive jurisdiction of that court. * * *"

We can only conclude that it is appellees' view of the law that SEC should be prohibited from "untangl[ing] the complexities"; that this Court "is not an appropriate forum" to do this and that the three-judge District Court should be the final arbiter of its own judgment.*

In reiteration, we single out only some of the problems that remain unresolved despite the occurrence of that which appellees claim has brought about mootness. There can be no mootness when:

> (1) Orders of ICC determining Alleghany's status as subject to ICC's regulatory jurisdiction have been voided *ab initio,* which if properly promulgated place Alleghany under ICC's jurisdiction no matter what Alleghany was forced to do after decision below and pending this Court's review.
>
> (2) Orders of ICC granting permission to Alleghany to proceed with its voluntary exchange of 5½% preferred stock for 6% preferred stock, have been voided *ab initio.* One of the many results of this voiding is that Alleghany cannot hold its annual meeting because it does not know which stockholders are entitled to vote and for what directors.

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* Convolutions of this character by appellees have not been unusual. We believe there are myriad statements or contortions of fact in appellee's Statement Suggesting Mootness which, if relevant, we hope to deal with in a brief on the merits.

The consequences from voiding both of the aforesaid groups of orders remain to be dispelled or determined by the decision of this Court. These consequences, if the decision below is not reversed, include but are not limited to results that may flow in collateral litigation brought by and/or fostered by the appellees against Alleghany in various courts.

We believe all of the foregoing amply demonstrates that this appeal is not now moot. If, however, we should be in error as to this, we call attention to this Court's statement of the law in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950), wherein it said:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

Accordingly, we respectfully request that should this Court find our appeal moot, that it not only enter an order of dismissal but also vacate the judgment below. As shown above, this is the Court's practice, but we emphasize this fact here because unless such order of dismissal in terms vacates the judgment below, there is danger that this judgment will be held *res judicata* in other litigation already instituted by appellees and now pending in various courts against Alleghany.* For an examination of the *res judicata* and *stare decisis* effects of judgments moot on appeal, see 23 Chicago Law Review 77 (1955). Appellees' recognition

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* See in this connection page 2 of appellees' "Statement in Opposition to Motion to Advance Case" where they admit "the dependency" on the judgment in this cause "of other proceedings such as the common stockholders' derivative action now pending in the District Court (*Breswick & Co.* v. *Briggs*, 135 F. Supp. 397)."

(in the footnote on p. 31 of their "Statement Suggesting Mootness") of this Court's practice of dismissing a lower court judgment when mootness intervenes and their prayer that "The judgment below should not be disturbed" is eloquent proof of that judgment's continuing vitality and the non-mootness of this cause.

The Motion to Dismiss or Affirm Should Be Denied

In so far as appellees have moved to dismiss, we wish only to point out that Rule 16(1)(a) of the Revised Rules of this Court provides that:

> "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules."

Nothing in appellees' papers even remotely suggests "that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute or to these rules."

In so far as appellees' papers are to be regarded as constituting a motion to affirm, Rule 16 (1)(c) of the Revised Rules of this Court states:

> "The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Again appellees' papers do not even remotely suggest that the questions presented are unsubstantial. The whole thrust of their argument is that the decision below in their favor is correct. Such a ground cannot support a motion to affirm in as complicated a situation as this case presents. We

believe our Statement as to Jurisdiction adequately discloses the existence of substantial questions which have a wide public import and which have been wrongly decided.

CONCLUSION

Alleghany's appeal is not moot. The motion to affirm or dismiss should be denied.

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DATED: APRIL 2, 1956.

Office Supreme Court, U.S.
FILED
DEC 14 1956
JOHN T. FEY, Clerk

No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ALLEGHANY CORPORATION; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.; and ADELAIDE NEUWIRTH, on behalf of herself and all other common stockholders similarly situated,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ALLEGHANY CORPORATION

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IN THE

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OCTOBER TERM, 1956

No. 36

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Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corportion, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ALLEGHANY CORPORATION

Opinions Below

This is an appeal from a permanent injunction issued by a three-judge District Court, constituted under the Urgent Deficiencies Act, at the suit of minority stockholders of Alleghany Corporation ("Alleghany").* The injunction set aside orders of the Interstate Commerce

*The plaintiffs claimed to hold 700 shares (.0002) of Alleghany's common stock (R. 32). Individual holders of 33,500 shares of common stock opposed the plaintiffs' position by intervention or affidavits (R. 144-147, 558).